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Supreme Court, U.S.
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No. 92-998

In The

Supreme Court of the United States

October Term, 1992

ALMA FAYE RUSSELL,

Petitioner,

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Circuit Court properly found Petitioner's Causes of Action to be barred by the applicable statute of limitations of the State of Texas.

(2) Whether the Circuit Court applied the proper standard of review for a Summary Judgment.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Board of Trustees of the Firemen, Policemen and Fire Alarm Operators' Pension Fund of Dallas, Texas ("Respondent"), respectfully submits its Brief in Opposition to Alma Faye Russell's request that a Petition for Writ of Certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit. Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Respondent, the Board of Trustees of the Firemen, Policemen and Fire Alarm Operators' Pension Fund of Dallas, Texas ("Respondent" hereinafter), disputes Alma Faye Russell's ("Petitioner" hereinafter) assertion and intentional mischaracterization of fact in her Petition for Writ of Certiorari that Respondent temporarily "withheld" her survivor benefits and that it was only after an evidentiary hearing pursuant to Section 6.07(d)(3) of Plan B that Respondent finally decided to deny her benefits. The true facts are that Petitioner's benefits completely and permanently ceased, pursuant to the express provisions of Plan B, upon her remarriage in 1986. Petitioner never complained or questioned the propriety of this event at that time.

When the wording of Section 6.07 before its amendment in 1988 is reviewed, it is clear that Petitioner's benefits had not been temporarily "withheld" but quite clearly terminated. Section 6.07 specifically uses the word

"withheld" only in the following contexts. (Pet. Appx. p. 33).

Section 6.07(b)(3) provides that Respondent may "withhold" survivor benefits until the eligibility of the applicant has been confirmed. In other words, survivor benefits would not commence *for the first time* until Respondent is satisfied that a person would be entitled to them. In that situation, a potential beneficiary would be entitled to a hearing as to why his or her benefits had not yet commenced. Section 6.07(d)(2) states that Respondent may withhold payment of benefits if Respondent believes that a surviving spouse is remarried *until such time as the surviving spouse furnishes proof that no marriage has taken place.* If it is proved no marriage ever took place, benefits resume.

Section 6.07(d)(6) states that no survivor benefits paid to a surviving child may be used for any other purpose than to benefit the surviving child and if Respondent believes that the benefits are not being properly administered for the benefit of the surviving child then Respondent may temporarily "withhold" payment of benefits until it is proved otherwise. Section 6.07(d)(9) states that Respondent may "withhold" payment of benefits if survivor benefits are being paid to surviving children living with some person other than the surviving spouse and Respondent believes that that person is not the legal guardian of the child. Then benefits may be temporarily "withheld" until legal guardianship is proved. Section 6.07(d)(12) states that Respondent may "withhold" survivor benefits from a party receiving such benefits if Respondent believes that they are no longer eligible to receive benefits *until such time* as the person

files a sworn statement reaffirming their eligibility to benefits.

These are the only provisions in Section 6.07 in which benefits may be temporarily "withheld." Petitioner's benefits were not temporarily withheld but permanently ceased under the express provisions of Section 6.07(d)(1) before it was amended in 1988. Indeed, prior to the 1988 amendment, Section 6.07(d)(1) specifically stated that benefits shall *cease* upon remarriage. (Pet. Appx. p. 33). With respect to the consequences of a spouse's remarriage, the Plan does not use the word "withheld" as it does in other sections of the Plan but specifically uses the word "ceased." When benefits *cease* as opposed to being *withheld*, the Plan does not provide for an evidentiary hearing.

The 1988 amendments left unaltered the use of the words "withheld" and "ceased." In the interest of brevity, Respondent will not recite at length those amended sections, but suffice to say that a clear reading of Section 6.07 shows that Petitioner's benefits were not temporarily "withheld," but permanently *ceased*, and that, therefore, no Section 6.07(d)(3) hearing was given.

Indeed, Petitioner herself acknowledged that her benefits were not temporarily withheld but permanently ceased in her own letter written in 1986 to Respondent where she stated that "I'm planning to get married April 26, 1986. I want to let you know in advance so you can make the *final check* correct and won't have to be returned, etc." (Pet. Appx. p. 10) (emphasis added).

Respondent does not contest the fact that Respondent, more than *three years* after her benefits ceased, as a matter of courtesy, allowed Petitioner to appear before it

and state why she felt entitled to reinstatement of benefits. But Respondent vehemently denies that this was done pursuant to Section 6.07(d)(3) of Plan B.

Respondent also contests the statement in Page 4 of Petitioner's Brief that summary judgment was granted before discovery had been fully completed in the trial court. Both Petitioner and Respondent conducted extensive discovery in this case and all discovery that was requested or sought was completed before summary judgment was granted. Furthermore, Petitioner never moved for a continuance or submitted a Rule 56 affidavit showing how more discovery would assist her in opposing the motion for summary judgment. Consequently, she has no complaint. *Netto v. Amtrak*, 863 F.2d 1210, 1215 (5th Cir. 1989); *Fontenot v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Lastly, although more properly deemed a legal argument, Petitioner has put in her statement of the case that the Fifth Circuit considered some but not all of the extrinsic evidence in affirming the summary judgment. First, Respondent would state that the "extrinsic evidence" complained of by Petitioner is a copy of the ballot sent to the members of the Pension Fund in order for them to vote on the proposed amendments to the Pension Fund. This ballot was attached to Respondent's Motion for Summary Judgment as an Exhibit. (R III, 1). As to the other "extrinsic evidence" that Petitioner states should also have been considered, *none of this evidence was in the record*!

SUMMARY OF ARGUMENT

Certiorari should be denied in this case because the Fifth Circuit's opinion does not conflict with *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). It also does not conflict with *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991) and *Greene v. Los Angeles City Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989).

It is irrelevant whether the Fifth Circuit's opinion conflicts with the Sixth or the Ninth Circuit because the issue raised here is not an issue of unsettled law, but one where this Court has spoken clearly in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). The Fifth Circuit accurately summarized the test in *Lorance* to determine limitations which is whether the original allegedly discriminatory act has the degree of permanence that should trigger the claimant's awareness of and duty to assert his or her rights. *See Lorance*, 490 U.S. at 906. Under the test in *Lorance*, Petitioner could not successfully assert a continuing tort because there was only one allegedly discriminatory act (i.e. the clear and permanent cessation of her benefits upon remarriage).

The holding in *Lorance* was that a facially neutral act that results in discrimination is not subject to the "continuing violations" theory and the statute of limitations thus begins to run from the date the act occurs or the statute is enacted. Conversely, a facially discriminatory act or statute may be subject to a "continuing violations" theory in which case the statute of limitations begins to run on the date that the consequences of the discriminatory act occurs or the statute is enacted. *See Lorance*, 490 U.S. at 906. In either event, *Lorance* cannot support Petitioner's claim that limitations has not here run. Even,

assuming *arguendo*, the Section 6.07(d), prior to the 1988 amendment, was facially discriminatory, limitations would still have run against Petitioner. This is because limitations would have commenced upon the date the Petitioner was, if at all, harmed by Section 6.07(d) which would be on April 10, 1986, when her benefits ceased upon remarriage. Therefore, under *Lorance*, the Fifth Circuit properly determined that limitations had run.

As the Fifth Circuit put quite accurately in its opinion, the issue is whether "the original discriminatory act had the degree of permanence that should trigger the claimant's awareness of and duty to assert her rights." *Russell v. City of Dallas*, 968 F.2d 489, 493 (5th Cir. 1992). Certainly, having one's benefits terminated upon remarriage and that termination becoming permanent would certainly be a degree of permanence and awareness which should trigger the claimant's awareness of and duty to assert her rights. This is especially true in this case where Petitioner was well aware of the provisions of Plan B many years before her husband retired and later became deceased and had herself authored a letter in 1986 acknowledging the consequences of her remarriage.

The Fifth Circuit's affirmance of Respondent's summary judgment against Petitioner does not conflict with its decision in *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983). Furthermore, even if the Fifth Circuit misapplied its own law, this would not be grounds for certiorari.

It is well established that it is not proper grounds to grant a Writ of Certiorari on the argument that the lower court has misapplied its own circuit's law. *Wisniewski v. United States*, 77 S.Ct. 633, 634 (1957). In addition, the

Fifth Circuit's decision does not violate its standard for "continuing violations" discussed in *Berry*. As the Fifth Circuit aptly observed in *Berry*, the important issue is whether the act complained of would have the degree of permanence which should trigger a party's awareness of and duty to assert his or her rights. *Berry*, 715 F.2d at 981. There is no doubt that Petitioner's benefits permanently ceased in 1986 and thus Petitioner must have complained of that action within two or four years of that date.

The affirmance of summary judgment on state statute of limitations endangers no national policies requiring remedy by Writ of Certiorari. Furthermore, the lower court's correctly ruled the claims barred by limitations.

The lower court's rulings can and should be upheld on a myriad of grounds. Any claim that Petitioner had as to the pre-1988 version of Plan B would clearly be barred by limitations because such would have arisen more than four years before the date of her lawsuit. As to Petitioner's claim that she is entitled to receive benefits under the 1988 amendment to Plan B, this would only be valid if the amendment were to be applied retroactively. The 1988 amendment cannot be applied retroactively for two reasons. First, the plan members specifically voted to not make it retroactive. Second, even if the plan members had not specifically stated the amendment was not retroactive, a statute in Texas is presumed to be prospective only unless it is expressly made retroactive. *See* Tex. Govt. Code. Ann. § 311.022 (Vernon 1988).

Likewise, Petitioner's claim that limitations was "tolled by a Section 6.07(d)(3) hearing" is also without merit. As explained fully in this brief, since her benefits were not temporarily *withheld* as defined by the Plan

itself, a Section 6.07 hearing could not have been held. Also, Petitioner's argument is rebutted by the theories and holdings of *Lorance, supra*, and *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Respondent notes that many state and lower federal courts have addressed the issue of whether benefits such as these are to be applied retroactively, whether limitations begins to run from the date benefits cease, and whether plans of this type are unconstitutional under either the state or federal constitutions. Petitioner cannot cite one case holding such in her favor, but Respondents cite later in this brief the multitude of cases that hold not only that limitations had run, but that Petitioner had no valid cause of action.

Lastly, Certiorari should be denied because the circuit court's holding does not expand the standard for summary judgment, but scrupulously follows the standard set by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986).

The only basis that Petitioner states for her claim that the standards in *Celotex* were not adhered to is her claim that the Fifth Circuit improperly relied upon the ballot to amend Plan B as part of its basis for affirming summary judgment. It is Petitioner's claim that the ballot was "extrinsic evidence." However, the ballot was not, as argued by the Petitioner, extrinsic evidence, because the ballot was attached to the Motion for Summary Judgment. This ballot was not challenged in Petitioner's Response to the Motion for Summary Judgment as required by the clear language of Fed. R. Civ. P. 56(e) as well as *Celotex*. Equally important, applicable state law requires that in deciding what a statutory intent is, the

"entire act" must be considered which means "the caption, the body of the act, and the emergency clause." *Brown v. Owens*, 674 S.W.2d 748, 750 (Tex. 1984).

REASONS FOR DENYING THE WRIT

No Conflict Between The Circuits or With This Court

1. **The Fifth Circuit affirmed Respondent's Summary Judgment because Petitioner's action was barred by the statute of limitations. This neither conflicts with *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) nor does it conflict with the holdings of the Ninth Circuit and the Sixth Circuit.**

All parties approaching this Court must respectfully recognize that the primary purpose for which this Court exercises its certiorari jurisdiction is to resolve major conflicts between the Circuit Courts of Appeals concerning the meaning or provisions of federal law. *Braxton v. United States*, 111 S.Ct. 1854, 1857 (1991). With over 5,000 petitions a year for certiorari filed with this Court, Petitioner must recognize the Supreme Court only has the time and resources to determine 120 to 140 of these cases. Certiorari should not be granted except in cases involving issues of *utmost importance to the national public*, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinions between the various Circuit Courts of Appeals. *Rice v. Sioux City Memorial Park Cemetery*, 75 S.Ct. 614, 620 (1955).

Continuing Torts

It is Petitioner's claim that the Fifth Circuit's decision is in conflict with *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991) and *Greene v. Los Angeles City Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989) in its interpretation of the doctrine of "continuing torts" for purposes of tolling the statute of limitations. Petitioner also claims that the Fifth Circuit decision conflicts with this Court's opinion in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). It is irrelevant whether the Fifth Circuit's opinion conflicts with the Sixth or the Ninth Circuit because this is not an issue of unsettled law but an issue where this Court has spoken clearly in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Therefore, the important question is whether the Fifth Circuit's opinion conflicts with *Lorance* and not whether it conflicts with the Sixth and the Ninth Circuit. Once this Court has spoken on the issue, then the applicable question is whether there is a "real and embarrassing conflict" between the Fifth Circuit's decision and a decision from this Court. *See* generally *Braxton v. United States*, 111 S.Ct. at 1157.

There is no conflict between the Fifth Circuit decision in this case and *Lorance*. Indeed, on page 10 of the Fifth Circuit's opinion the Court acknowledges that the test to be applied in determining whether there is a continuing tort or continuing violation which would suspend the statute of limitations is the test enunciated by this Court in *Lorance*. The underlying rationale for any such tolling or suspending limitations is whether the claimant was aware or should have been aware that he or she had a claim.

If such awareness is obvious, then there is no rational reason for suspending the statute of limitations. The purposes of a statute of limitations are laudatory and a primary purpose is to eliminate stale claims where memories may fail and the evidence may be misplaced, lost or otherwise not now available because the claimant waited so long to pursue his or her claim. *See Delaware State College v. Ricks*, 449 U.S. 250, 260 (1980). Under the test in *Lorance*, Petitioner could not successfully assert a continuing tort because there is only one allegedly discriminatory act (i.e. the clear and permanent cessation of her benefits upon remarriage).

Petitioner claims that a cessation of survivor benefits upon remarriage unlawfully restricts the right to marry and is therefore unconstitutional. But, setting aside for the moment the merits of that argument, the issue of whether or not Petitioner was aware that her survivor benefits would terminate upon remarriage and in fact did terminate upon remarriage is beyond dispute. This is evidenced by her letter to Respondent acknowledging both the cessation of her survivor benefits and in doing so her understanding of the clear language of Plan B, which terminated her right to benefits upon remarriage. (Pet. Appx. p. 33). It is not disputed that the statute of limitations for her Constitutional and tort claims are two years. As this claim arose, if at all, at the latest in April of 1986, the date Petitioner's survivor benefits ceased upon remarriage, then it is obvious that limitations ran long before Petitioner filed suit in May 1990.

The *Lorance* Case

An examination of the *Lorance* case clearly establishes that the Fifth Circuit's opinion is not in conflict with *Lorance* and affords no basis for granting a Writ of Certiorari. In *Lorance*, this Court addressed the issue of when the statute of limitations ran in a Title VII action. The *Lorance* case involved a facially neutral seniority system whose application in fact caused sex discrimination in promotion and hiring. The issue in *Lorance* was whether limitations began to run from the date the seniority system was amended or from the date that Plaintiff was tangibly harmed by not being promoted under the old system. This Court held that limitations began to run when the discriminatory act occurred, which was with the amendment to the seniority system and *not* when the effects of that action were felt, (i.e., when the Plaintiff was not promoted).

This Court rejected any argument that a "continuing violations" theory would toll limitations under the theory that the alleged wrongdoing took place when the result of that discriminatory act was felt. Rather, this Court held that the proper focus is upon the time of the discriminatory act and not upon the time which the consequences of the act becomes most painful. *Lorance*, 109 S.Ct. at 2266, 490 U.S. at 906. Petitioner's argument was rejected in the *Lorance* case, as well as in this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977). The holding in *Lorance* is that a facially neutral act that results in discrimination is not subject to the "continuing violations" theory and the statute of limitations thus begins to run from the date the act occurs or the statute is enacted.

Conversely, a facially discriminatory act or statute may be subject to a "continuing violations" theory in which case the statute of limitations begins to run on the date that the consequences of the discriminatory act occur or the statute is enacted. *See Lorance*, 490 U.S. at 906.

In either event, *Lorance* cannot support Petitioner's premise. Even, assuming *arguendo*, that Section 6.07(d), prior to the 1988 amendment, was facially discriminatory, limitations would still have run against Petitioner. This is so because if Section 6.07(d) is facially neutral, then limitations would have run from the date Plan B first included language causing benefits to cease upon remarriage. This would have been in the year 1973, many years before the suit was filed. On the other hand, if it is assumed, *arguendo*, that Section 6.07(d) is facially discriminatory, then limitations would have commenced upon the date that Petitioner was harmed by Section 6.07(d), which would be on April 10, 1986, when her benefits ceased upon remarriage. However, even under this scenario, limitations has still run. It provides no comfort for Petitioner to argue that under *Lorance* a "continuing violations" occurred when, regardless, her claim would still be barred by limitations. The only difference is if Section 6.07(d) was considered facially neutral then limitations expired long before 1988, while if Section 6.07(d) is considered to be facially discriminatory then limitations began to run in 1986. Therefore, under *Lorance*, the Fifth Circuit properly determined that limitations had run.

As the Fifth Circuit quite accurately noted in its opinion the issue was whether "the original discriminatory act had the degree of permanence that should trigger the claimant's awareness of and duty to assert her

rights." *Russell*, 968 F.2d at 493. Certainly, cessation of benefits upon remarriage, which is permanent, would certainly be a degree of permanence and awareness that should trigger the claimant's awareness of and duty to assert her rights. This is especially true in this case where Petitioner was well aware of the provisions of Plan B many, many years before her husband retired and later became deceased.

Although discussed in more detail later in this Brief, it is clear from this Court's own holdings that even if limitations had not run, summary judgment would have been proper because Petitioner's claim that Plan B violated due process or equal protection is without merit. The Fifth Circuit is not required to rest its affirmance of the trial court on the grounds adopted by the trial court but instead may affirm the judgment on any alternative and proper legal grounds. *Degan v. Ford Motor Company*, 869 F.2d 889, 992 (5th Cir. 1989).

2. **The Fifth Circuit's affirmance of Respondent's summary judgment against Petitioner does not conflict with its decision in *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983). Furthermore, even if a circuit court misapplied its own law, this would not be grounds for certiorari.**

It is Petitioner's contention that the Fifth Circuit's decision also misapplied the Fifth Circuit's own standard for determining continuing violations as established in *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986). First, it is not proper grounds to grant a Writ of Certiorari on the argument

that the lower court has misapplied its own circuit's law. *See Wisniewski v. United States*, 77 S.Ct. 633, 634 (1957). In any event, the Fifth Circuit's decision here does not violate its standard for "continuing violations" discussed in *Berry*.

In *Berry*, the plaintiff complained of sex discrimination in that she was given more work as a professor than her male colleagues for the same amount of pay and that the work structure was designed to force her out of her position. The plaintiff had filed suit sometime after she was notified that she would not be rehired by the defendant university. The plaintiff had alleged a "continuing violation" of Title VII which would preclude the statute of limitations from running on her claim. The Fifth Circuit found no merit in this claim. The Fifth Circuit stated that a "continuing violations" theory will not stand "to resurrect claims about discrimination concluded in the past, even though its effects persist." *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980).

Likewise, Petitioner only alleges one concrete act of "discrimination." The act occurred when her benefits ceased upon remarriage in 1986. As the Fifth Circuit aptly observed in *Berry*, the important issue is whether the act complained of would have the degree of permanence which should trigger a party's awareness of and duty to assert his or her rights. *Berry*, 715 F.2d at 981. There is no doubt that Petitioner's benefits permanently ceased in 1986 and thus Petitioner must have complained of that action within two or four years of that date.

The court in *Berry* also held that an act of discrimination that results in termination cannot, per se, constitute a

continuing violation that would extend the time for filing a complaint because it was a discrete act of discrimination of which the plaintiff was obligated to seek relief within the applicable period of limitations. *See Delaware State College*, 449 U.S. at 257. Likewise, when Petitioner's benefits ceased in April 1986 that would be the latest possible date from which limitations would run.

Petitioner's claim that Respondent's amendment of the Plan in 1988 gives rise to a new and independent cause of action also fails. Under the applicable two year statute of limitations, Petitioner would still be barred and Petitioner had no standing to assert those claims because as the trial court aptly held:

> Petitioner would have no standing to raise any claim that would arise after her termination of benefits because she is no longer a member of the Plan.

See Dallas Gay Alliance v. Dallas County Hospital District, 719 F.Supp. 1380, 1383-86 (N.D. Tex. 1989); *Harvey v. Casebeer*, 531 S.W.2d 206, 208 (Tex. Civ. App. Tyler 1975, no writ).

3. The affirmance of a summary judgment on state statute of limitations grounds endangers no national policies requiring remedy by Writ of Certiorari. Furthermore, the lower courts correctly ruled the claims were barred by limitations.

No Cause of Action

Petitioner cites the case of *Joseph v. New Orleans Electric Pension*, 754 F.2d 628 (5th Cir. 1985), *cert. denied*, 474

U.S. 106 (1985) for the proposition that she was entitled to raise her post-1986 claims. A close examination of *Joseph*, as well as Petitioner's own analysis of the *Joseph* case, actually supports the trial court's holding. In *Joseph*, a group of retirees accepted lump sum retirement benefits in lieu of a continuing monthly benefit that might have yielded a smaller sum. More than seven months after this election, the Trustees amended the pension plan to increase the benefits but made the amendment retroactive for only the prior seven months. A group of retirees who retired longer than seven months prior filed suit. These retirees were found not to have standing to raise a claim because they had retired more than seven months prior to the amendment, had accepted all the benefits due them under the plan as it then existed, and therefore had no reasonable expectation of benefits.

Likewise, Petitioner has no basis to raise any post-1986 claims. When Plan B was amended in 1988, Petitioner was no longer entitled to benefits under Plan B, she had accepted all the benefits due her under Plan B, as in effect prior to 1988, and had no reasonable expectation of future benefits.

The only possible way for Petitioner to receive any benefits under the 1988 amendment would be if the amendment applied retroactively. The 1988 amendment cannot be applied retroactively for two reasons. The first reason is that when Plan B was amended, the members of the Plan explicitly voted to make the amendment effective from April 21, 1988 forward. Equally important, and a fact which Petitioner chooses to ignore, is that even if the ballot failed to state it was not retroactive, the amendment would not be applied retroactively. That is because

in Texas a statute is presumed to be prospective in its application only, unless it is *expressly made retroactive*. *See Ex Parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981); Tex. Govt. Code Ann. § 311.022 (Vernon 1988).

Limitations Not Tolled By Hearing

Petitioner also argues that the statute of limitations did not run on her cause of action because she claims she was given a Section 6.07(d)(3) hearing and, until the results of that hearing became final in 1989, limitations did not begin to run. As explained earlier in this Brief, since her benefits were not temporarily *withheld* as defined by the Plan itself, a Section 6.07 hearing could not have been held. Second, and equally important, is that this argument is rebutted by the theories and holdings of *Lorance, supra* and *Delaware State College, supra*.

If the Court were to adopt Petitioner's argument, that limitations does not begin to run until the time she issues a complaint to Respondent, then the running of the statute of limitations would be solely under the control of the potential plaintiff. This action could be commenced three years, thirty years, or even three hundred years from the date of the purported discriminatory action and, thus it would never be barred by limitations. This runs totally contrary to the holdings in the above-mentioned cases as well as the general and accepted theory that statute of limitations are desirable procedural mechanisms to prohibit the prosection of stale claims. *See Delaware State College*, 449 U.S. at 260.

Petitioner's recitation of her alleged request for a Section 6.07(d)(3) hearing is not altogether correct. What

actually occurred was that on February 13, 1988, Petitioner wrote Respondent stating that she was getting a divorce and wanted her survivor's benefits reinstated (R VI, 277). On March 15, 1988, Respondent wrote Petitioner back stating that the Plan language contained no provision to reinstate benefits if the marriage results in a divorce, so there would be no reinstatement of her survivor's benefits (R VI, 278).

In August of 1988, Petitioner's attorney wrote a letter to the City Attorney's office demanding that Petitioner's survivor benefits be reinstated or that she would file a lawsuit (R III, 149). No reinstatement occurred. In February of 1989, Petitioner's attorney wrote yet another letter stating that she represented Petitioner and requested a hearing before Respondent to present her reasons why she was entitled to reinstatement of her survivor benefits. (R III, 154). Respondent wrote in February of 1989 agreeing as a courtesy to allow Petitioner to speak (R VII, 142).

In March of 1989, Respondent wrote Petitioner's attorney stating that Respondent would consider Petitioner's request. On May 15, 1989, Respondent wrote Petitioner stating that the clear language of Section 6.07 dictated that Petitioner was not entitled to any reinstatement of benefits (R III, 163).

It is inconceivable that upon review of these facts, any action taken by Respondent could raise a reasonable inference giving Petitioner the expectation that Respondent would grant her request for reinstatement. Indeed, Respondent stated on several occasions there would be no reinstatement. Respondent did agree, as a courtesy to her, to allow Petitioner to speak to Respondent at one of

its meetings and state her position. Respondent never stated implicitly or explicitly that it would reinstate her survivor benefits.

None of Respondent's actions subsequent to the date Petitioner's benefits ceased could "toll" the statute of limitations, because the rule of law is that the "reconsideration" of an allegedly "discriminatory decision" does not toll the accrual of a cause of action past the initial date of the discriminatory decision. *Griffin v. Big Spring Independent School District*, 706 F.2d 645, 649 (5th Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983); nor does pursuing administrative remedies "toll" the statute of limitations. *Delaware State College*, 449 U.S. at 256-261.

No National Policies Affected

The Fifth Circuit's affirmance of the trial court's granting summary judgment based upon, *inter alia*, the statute of limitations, endangers no national policies protecting individual rights nor does it infringe upon the right to marry. As explained above, under *Lorance* whether the Plan was facially neutral or facially discriminatory, the statute of limitations would have run long before Petitioner filed suit.

In addition, Writ of Certiorari should not be granted in this case because any complaint that Petitioner may have as to the discriminatory effect of cessation of benefits upon her "right to marry" has been waived. This is because this issue was not raised in her brief to the Fifth Circuit and has therefore been waived. *See Rogers v. Lodge*, 102 S.Ct. 3272, 3281 (1982); *Price v. Digital Equipment Corp.*, 846 F.2d 1026, 1028 (5th Cir. 1988). As this Court

has stated, a contention not raised in the Court of Appeals will not be considered by this Court. *Rogers*, 102 S.Ct. at 3281.

Right to Marry

Even, assuming *arguendo*, that this point was validly raised in this Court, Petitioner's complaint that Section 6.07(d) of Plan B, as in effect prior to 1988, violated her constitutional right to remarry has been foreclosed by this Court in *Califano v. Boles*, 443 U.S. 282 (1979) and *Califano v. Jobst*, 434 U.S. 47 (1977).

To illustrate this point, Respondent will just briefly discuss the facts and holdings of these two cases. In *Jobst*, this Court held that a provision in the Social Security Act terminating a disabled dependent child's benefits upon remarriage was constitutional. The Court found it rational to assume that a married person is less likely to be dependent upon his or her parents for support than an unmarried child. This Court reasoned further that an act does not render it invalid simply because some persons who might otherwise get married were deterred by the Act or because some who did not marry were burdened by the Act. This Court concluded that the rule terminating the benefits payable to a secondary beneficiary (like Petitioner) upon marriage was unquestionably valid.

It is rational to assume that widows and widowers who remarry are less likely to be dependent upon survivor's benefits than those who do not. Like *Jobst*, the provision challenged is part of a complex plan designed to administer trust funds financed by the primary beneficiary to the funds, the employee. Like *Jobst*, the

entitlement of any secondary beneficiary is solely predicated on his or her relationship to the primary beneficiary. In examining the facts and holdings of *Jobst*, it could only be concluded that upon examining the merits of Petitioner's claim, her claim must fail.

Likewise, in *Boles*, the benefits in question were "mother's insurance benefits" provided under the Social Security Act to widows and divorced wives of deceased wage earners and not provided to women who had never married the wage earner who fathered her child. This Court again held this distinction to be constitutional.[1] Again, the concern of the Respondent in administering the fund with its limited resources to provide benefits to its police officer and fire fighter members, as well as their eligible survivors who need help the most, is certainly rational. To conclude that a widow or widower who remarries is going to be less dependent on survivor's benefits than one who does not remarry and for whom the survivor's benefits are the only source of sustenance is not only rational but basic common sense.

Retroactivity and Constitutionality

Respondent notes that many state and lower federal courts have addressed the issue of whether benefits such

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[1] *Boles* held:

> General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases.

Citing *Jobst* at 434 U.S. at 53.

as these are to be applied retroactively, whether limitations begin to run from the date benefits cease, and whether plans of this type are unconstitutional under either the state or federal constitutions. Petitioner cannot cite one case holding such in her favor, but Respondents will cite the multitude of cases that hold not only procedurally that limitations have run, but also that Petitioner has no valid cause of action. These cases are: *Atkinson v. Retirement Board of Police Retirement System of Kansas City*, 343 S.W.2d 25 (Mo. 1960); *Minor v. Stafford*, 157 N.E. 164 (Ill. 1927); *Burgess v. City of Detroit*, 102 N.W.2d 483 (Mich. 1960); *Young v. O'Keefe*, 82 N.W.2d 111 (Iowa 1957); *Kerr v. Murphy*, 484 S.W.2d 684 (Ark. 1972); *McCarrey v. Utah State Teachers Retirement Board*, 177 P.2d 725 (Utah 1947); *In re Ross*, 207 P.2d 254 (Okla. 1949); *Linaka v. Firemen's Pension Fund of Philadelphia*, 31 A.2d 122 (Pa. 1943); *Pitts v. City of Richmond*, 366 S.E.2d 56 (Va. 1988); *People ex rel. Schmidt v. Yerger*, 172 N.E.2d 753 (Ill. 1961); *Klann v. State*, 126 N.E.2d 487 (Ind. 1955); *State ex rel. Phillip v. Public School Retirement System of the City of St. Louis*, 262 S.W.2d 569 (Mo. 1953); *Koehnlein v. Retirement System for Employees of Allegheny County*, 97 A.2d 88 (Pa. 1953); *State v. Murphy*, 224 S.W.2d 68 (Mo. 1949); *Burton v. City of Albany*, 242 N.Y.S.2d 510 (N.Y. App. 1963); *S.W. Baird v. City of Fresno*, 217 P.2d 681 (Cal. App. 1950); *Villovic v. Valentine*, 294 N.Y.S. 352 (N.Y. App. 1936); *Haines v. Police Pension Board of the City of Phoenix*, 733 P.2d 1129 (Az. App. 1987); *McVay v. City of Washington Firemen's Pension Fund*, 556 A.2d 267 (Pa. 1989); *McCourtney v. Cory*, 176 Cal.Reporter 639 (Cal. App. 1981); *Chaunser v. Commissioners of Employment System of City of Newark*, 275 A.2d 1205 (N.J. App. 1977); *City of*

Philadelphia Board of Pensions and Retirements v. Boardly, 481 A.2d 690 (Pa. App. 1984).

4. Writ of Certiorari should be denied because the Circuit Court's holding does not expand the standard for summary judgment but scrupulously follows the standard set by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986) and its progeny.

Application of Summary Judgment Standard

Petitioner's final remaining argument is that certiorari should be granted because the Circuit Court violated the standards for granting summary judgment set down by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986) and its progeny. Again, for certiorari to be granted it must be shown that there is a conflict that is *clear, direct* and *unmistakable* with Supreme Court precedent and that such a conflict under the circumstances would create law of such national importance and effect that this Court should step in and exercise its discretionary powers to correct the error of the lower court. Vol. 13, Moore's Fed. Prac., Section 810.45 (2nd ed., 1991). The real issue in this case as to whether the summary judgment standard was properly applied does not affect such a great issue of national importance that certiorari is warranted. Second, and equally important, a review of the Fifth Circuit's decision clearly establishes that the Fifth Circuit's opinion is consistent with and not in conflict with the Summary Judgment standard set down by this Court.

The Ballot as Evidence

The Fifth Circuit properly relied upon the language in the ballot as one basis for affirming the trial court's decision. The ballot was not, as argued by Petitioner, extrinsic evidence because the ballot was attached to the Motion for Summary Judgment. (R III, 1). This ballot was not challenged in Petitioner's response to the Motion for Summary Judgment as required by the clear language of Fed. R. Civ. P. 56(e), as well as *Celotex*. Equally important, applicable state law requires that in deciding what a statute's intent is, the "entire act" must be considered which means "the caption, the body of the act and the emergency clause" *Brown v. Owens*, 674 S.W.2d 748, 750 (Tex. 1984). The caption of the amendment clearly provided for prospective application. *See Russell*, 968 F.2d at 493.

Furthermore, under the clear and unequivocal law of the State of Texas governing retroactivity, in the absence of an express statement in the Plan clearly and expressly stating that it is to be applied retroactively, the plan will not be applied retroactively. *See* Tex. Govt. Code Ann. § 311.022. The ballot reflects prospective application language. Even if the ballot were not considered the result would still be the same. What the ballot showed was a clear intent and a clear statement that the amendment was not to be applied retroactively. But even without that, the same result would occur under Section 311 of the Texas Government Code.

Retroactive Application

Petitioner argues that the Plan, as administered, is in fact applied retroactively because widows who had not previously remarried but whose husbands had died prior to 1988 would continue to receive survivor benefits while those widows who had remarried before 1988 and whose husbands had also died before 1988 would not receive survivor benefits. Petitioner argues that if her rights were "fixed and determined" by the Plan as it existed when her husband died, then all other widows' rights should be "fixed and determined" when their husbands died and they should not benefit from an amendment merely because they had not remarried at the time of the amendment.

Petitioner confuses the very nature of her survivor benefits. Upon the death of her husband, Petitioner's benefits under the Plan became "fixed and determined." The Plan benefit to which Petitioner thus became entitled was survivor benefits payable only until the earlier of her death or remarriage. When Petitioner remarried prior to the 1988 Plan amendment, all her right or entitlement to survivor benefits ceased. Petitioner was no longer in a class of persons entitled to benefits under the Plan, once she remarried.

The fact that some widows whose survivor benefits "fixed and determined" *before* 1988 had, as of 1988, not remarried or died, either of which would have caused their cessation of benefits, and the fact that the 1988 amendment relieved such widows from exposure to future benefit cessation from remarriage, does not alter the prospective application of the 1988 amendment's

removal of the remarriage rule. For an excellent illustration of how this traditional principle applies in benefit cases, please see the case of *Minor v. Stafford*, 157 N.E. 164 (Ill. 1927).

Fiduciary Claims

Lastly, Petitioner argues that summary judgment was improper because it ignored her breach of fiduciary duty claim in that the Board of Trustees had a fiduciary duty to Petitioner to treat her in the same manner as they treated other similarly situated widows. The fallacy of this claim is that Respondent did just that. All widows who remarried prior to April 21, 1988 ceased receiving survivor benefits. All widows who remarried after April 21, 1988 continued to receive survivor benefits. Once Petitioner's survivor benefits ceased and she was paid under the terms of the Plan as it existed both at the time of her husband's death and at the time of her remarriage, respondent no longer had a fiduciary duty to her. She was no longer a qualified surviving spouse entitled to receive benefits.

CONCLUSION

Writ of Certiorari should be denied because this case presents no proper basis for granting certiorari. There is no conflict with other circuits in this case. The Fifth Circuit's opinion does not conflict with this Court's opinion in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), nor does it conflict with the summary judgment standards set out in *Celotex v. Catrett*, 477 U.S. 317 (1986)

and its progeny. This case does not entail any great issues of national or even regional import and, when it is examined closely, is no more than a routine summary judgment case based upon state statute of limitations.

What is presented is a survivor under a pension plan who received the very benefits called for by the express terms of the Plan until an event of benefit cessation occurred (remarriage), at which time Respondent had fulfilled its obligations to Petitioner, having paid all the benefits to which Petitioner was entitled. Plan B was later amended more than two years after this event and Petitioner now wants to be brought back into the Plan. The Plan has no provision for reinstatement after benefits have been paid in full. More than four years after her survivor benefits were paid in full, Petitioner brought suit alleging various tort and contract-based causes of action.

All of these causes of action are subject to either a two or a four year statute of limitations. All of Petitioner's claims were brought more than four years after the running of the statute of limitations. Summary judgment based upon limitations is proper. Moreover, although summary judgment was granted on the basis of statute of limitations, it could have just as easily been granted on the merits because this Court and others have found that none of Petitioner's causes of action are viable. Consequently, because this case involves routine state law and federal law statute of limitations issues which have been decided against Petitioner's claims in

numerous other cases, Writ of Certiorari should be denied.

Respectfully submitted,

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